UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RICK SUMMERS, Defendant.	No. CR04-3011-MWB **REPORT AND RECOMMENDATION ON MOTION TO DISMISS**

This matter is before the court on the motion to dismiss (Doc. No. 12) filed by the defendant Rick Summers. The plaintiff (the "Government") resists the motion. (Doc. No. 15) Pursuant to the trial scheduling order (Doc. No. 9), motions to dismiss in this case were assigned to the undersigned U.S. Magistrate Judge for review, and the filing of a report and recommended disposition. Accordingly, the court held a hearing on the motion on March 11, 2005. Assistant U.S. Attorney Shawn Wehde appeared on behalf of the Government. Summers appeared in person with his attorneys, Robert Lengeling and Matt Metzgar.

Summers offered the testimony of his State of Iowa probation officer, Cathy Davis, and his girlfriend, Nicole Owens. The Government offered the testimony of Iowa DCI Agent Scott Edward Lamp, and Deputy U.S. Marshal Michael Fuller. The following exhibits were admitted into evidence: **Def. Ex. A** -- copy of a State of Iowa identification

card for Rick Summers;[1] **Gov't Ex. 1** – copy of an e-mail message from Deputy Paul Samuelson to Scott Lamp dated July 29, 2003; **Gov't Ex. 2** – Voluntary Statement of David Morford dated 9-11-03; **Gov't Ex. 3** – Records check dated 09/25/2003, regarding Richard Keith Summers.[2]

The court finds the motion has been fully submitted and is ready for decision.

BACKGROUND FACTS

The basis of Summers's motion is his claim that the Government delayed unreasonably in indicting and arresting him. The following chronology of events led to his indictment and arrest.

In mid to late 2000, and into early 2001, Lamp, who then was with the Iowa Division of Narcotics Enforcement ("DNE"), was investigating twenty or more individuals who were suspected of conspiring to manufacture and distribute methamphetamine. During the investigation, various cooperators implicated Summers in drug-related activities. In June and July 2003, Lamp undertook efforts to locate Summers. Cooperators had indicated Summers was living in an old church building in Bradgate, Iowa.

Lamp ran a criminal history on Summers in July 2003, and he also spoke with Humboldt County Sheriff's Deputy Paul Samuelson. Samuelson verified through motor vehicle records that the Bradgate, Iowa, address was listed as Summers's address. Samuelson also provided Lamp with information on a red Chevrolet truck registered to

[1]The exhibit is attached to Summers's motion, Doc. No. 12-1.

[2]All three of the Government's exhibits are attached to the Government's resistance, Doc. No. 15. Exhibits 4, 5, and 6, also attached to the resistance, were neither offered nor admitted into evidence at the hearing.

Summers's father that had been seen at the old church building in Bradgate. (*See* Gov't Ex. 1) Lamp made no attempts to contact Summers at that time.

In September 2003, Lamp received information from Daniel Morford, a cooperator, that Morford had had contact with Summers near the old church building in Bradgate. On September 11, 2003, Lamp had Morford approach Summers and inquire about purchasing some drugs. (*See* Gov't Ex. 2) Later that night, Morford and Lamp went to the old church building looking for Summers, but he was not there and the building did not look inhabited. There was evidence someone had lived in the building recently, but it appeared the building was abandoned at that point in time.

On September 25, 2003, Lamp checked Iowa Department of Transportation records and found that Summer's driver's license bore an address in Dayton Iowa. He also learned Summers's license was barred due to repeated minor violations and nonpayment of fines. (*See* Gov't Ex. 3) No further efforts were made to locate Summers at that time.

In December 2003, Lamp and other officers debriefed Kyle Woodle, an inmate in the Storey County Jail. Woodle gave information implicating Summers in drug-related activities. Woodle was scheduled to testify before the Grand Jury in January 2004, but he failed to appear. He was rescheduled once or twice, and finally testified before the Grand Jury on February 25, 2004. Woodle testified he had purchased methamphetamine from Summers, and he had acquired pseudoephedrine pills and given them to Summers to use in manufacturing methamphetamine. Summers was indicted by the Grand Jury and a warrant was issued for his arrest on February 26, 2004.

At that time, Lamp was preparing to leave his position with the Iowa DNE. He testified no one else had been hired to run the Fort Dodge office, which had been under his direction. Because he knew he was leaving, Lamp notified local law enforcement

officers in Webster, Green, Calhoun, and Humbolt Counties that a warrant had been issued for Summers's arrest. Lamp also provided the Bradgate, Iowa, address to local officers. He told local officers he had no information about Summers's whereabouts other than the Bradgate address and the first name -- Nicole -- of Summers's girlfriend. At the hearing, Lamp testified his notification to local law enforcement was in the form of oral conversations "off and on"; he did not write a memo or report regarding Summers. Lamp stated he did not run Summers's driver's license information again, did not call Summers's father to ask about Summers's whereabouts, and did not take other efforts to locate Summers. Lamp acknowledged that a driver's license check in 2004 would have revealed Summers's non-driver's I.D. card, which the evidence indicates was issued on December 3, 2003. (*See* Def. Ex. A) Lamp stated, "I should have ran [sic] a driver's license check of him again."

Before he left his position in April 2004, Lamp notified the U.S. Marshal that Summers had not been apprehended, and he asked the Marshal to enter the warrant on NCIC. Deputy Marshal Fuller stated when a warrant is issued in a case involving State law enforcement, the warrant will be brought to the Marshal, but the Marshal usually takes no action on the warrant until local officers have exhausted all means to locate and arrest the defendant. Then the local officers will ask the Marshal to enter the warrant on NCIC.

Fuller testified he placed the warrant for Summers's arrest on NCIC on April 29, 2004. Fuller was aware that Lamp had left his job in mid-April 2004. When Lamp asked Fuller to enter the warrant on NCIC, Fuller recalls that either Lamp or the U.S. Attorney told him Summers was homeless. Lamp told Fuller he thought Summers might have been staying in an old church somewhere in the Fort Dodge area, but he had been to the church and had not located Summers, although there was some evidence he had been there.

According to Fuller, Lamp said he had exhausted all efforts to locate Summers, and he had informed local officers about the existence of a warrant for Summers's arrest. Fuller stated he did not take any immediate action to locate Summers because the information he had received from Lamp led him to believe it would take numerous interviews and further investigation to find Summers, and Fuller was busy with other matters at the time.

After Fuller entered the Summers warrant on NCIC, Fuller became involved in security arrangements for a high-profile death penalty trial in this court. He stated the Marshal's office did nothing further to try to locate Summers until late January or early February 2005. At that time, Fuller was conducting a periodic review of his open case files to check for new leads on active cases. He ran Summers's Social Security number, looking for wage payments in Iowa. He discovered Summers had been working in the Emmetsburg or Algona area for a couple of different employers, and at that time Summers was receiving unemployment payments. Through unemployment records, Fuller got an address for Summers of 2306 10th Street, Emmetsburg, Iowa. He contacted local law enforcement and with their assistance, Fuller learned there was a phone at the Emmetsburg address in the name of Nicole Owens. In addition, he learned some utilities at the address were in Nicole Owens's name. Officers went to the Emmetsburg address on or about February 11, 2005, and arrested Summers.

To contradict the Government's claim that he had been difficult to locate until early 2005, Summers offered the testimony of his State probation officer, Cathy Davis. Davis testified she has been supervising Summers's probation from a State conviction since October 16, 2000. She stated he has contacted her regularly and kept her up to date on his whereabouts and employment. She has seen him, talked to him, or had a written report from him at least monthly since his term of supervision began.

Davis's records indicate Summers worked for a farmer in Humbolt County from February to May 2003. From May 2003 to October 2004, he worked for Protein Resources in West Bend, Iowa. From October 2004 to early 2005, he worked for Agra Services of Northern Iowa in Emmetsburg, Iowa.

Davis stated Summers reported a change of address on September 1, 2003, from Bradgate, Iowa, to 1709 17th Street, Emmetsburg, Iowa. He lived there until June 1, 2004, when he submitted a change of address to 2306 10th Street in Emmetsburg. To her knowledge, he has continued to live at the 10th Street address in Emmetsburg since June 1, 2004. She stated she had sent mail to Summers at each of his reported addresses and no mail had been returned to her as undeliverable for any reason.

Davis stated she checks NCIC records when she initiates supervision of an individual, and again just before the individual is discharged from probation. She did an NCIC check on Summers in 2000, when his probation began, but she had not done a check since that time. She stated Summers's probation was extended at the end of three years to allow him additional time to repay his court-ordered obligations. He has now repaid those obligations in full, but she had not yet done another NCIC check. Davis stated her first knowledge of any investigation of Summers or the issuance of a warrant for his arrest was when she received a phone call from U.S. Probation Officer Chris Hopper on February 14, 2005, after Summers had been arrested on the federal charges.

Nicole Owens also testified at the hearing. She stated she and Summers have lived together for about three years, including the entire time Summers lived in Bradgate and Emmetsburg. She stated the electricity at the Bradgate address and at both of the Emmetsburg addresses was in Summers's name, through MidAmerican Energy.[3] All

[3]The court finds no discrepancy between Owens's testimony that the electricity at the Bradgate and (continued…)

three of those residences were rental properties, and Owens stated both of their names were on the rental agreements for the properties.

Owens stated the first time she became aware that authorities were looking for Summers was on February 11, 2005, when officers knocked on their door and arrested Summers.

The court admitted into evidence Defense Ex. A, attached to Doc. No. 12-1, which is a State of Iowa Non-Driver I.D. card issued on December 8, 2000, to Richard Keith Summers at 1709 17th Street, Emmetsburg, Iowa.

In his motion, Summers asserts prejudice from the delay in prosecuting him because in the intervening period between commencement of the investigation and his ultimate arrest, he has fathered two children, now 18 months and 8 months old. He states he would not have fathered these children if he had known he was under investigation or facing indictment and a prison term, and he has "turned his life around and has been a law abiding citizen for the last two and a half years." (Doc. No. 12-1, p. 2) Summers offered no evidence at the hearing to substantiate these claims. However, the court previously has reviewed a Pretrial Services Report prepared by U.S. Probation which indicates Summers has two children under the age of two years, and he has had no involvement with law enforcement for the past two and one-half years. In addition, the Government did not dispute or offer evidence at the hearing to contradict Summers's factual assertions regarding his family and his criminal history.

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[3](…continued)
Emmetsburg residences was in Summers's name, and the information provided to Fuller by local law enforcement that utilities at the Emmetsburg residence were in Owens's name. There is no evidence law enforcement checked with MidAmerican Energy regarding utilities at the residences, and it is possible utilities through the City were in Owens's name while the electricity was in Summers's name.

ANALYSIS

Summers moves for dismissal of the Indictment, arguing the Government failed to indict and arrest him in a timely manner in violation of his Sixth Amendment right to a speedy trial. (*See* Doc. No. 12-1, p. 1) His motion addresses two time periods – pre-indictment, and post-indictment but pre-arrest.

Regarding any "delay" in indicting him, Summers has offered no argument or authorities that the Government is required to indict a defendant within any particular period of time. The Government did not decide until after Woodle's testimony on February 25, 2004, that enough evidence existed to indict Summers. Based on these facts, there is no basis for Summers's claim that his rights were violated by any delay in indicting him. An accused's Sixth Amendment speedy trial rights are "activated only when a criminal prosecution has begun . . . [by] either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *United States v. Marion*, 404 U.S. 307, 313, 320, 92 S. Ct. 455, 459, 463, 30 L. Ed. 2d 468 (1971); *accord United States v. Garner*, 32 F.3d 1305, 1309 (8th Cir. 1994).

The crux of Summers's motion deals with the nearly one-year period between the time he was indicted and the time he was arrested. Summers argues this delay implicated his speedy trial rights under the Sixth Amendment, causing him prejudice in preparing his defense and requiring dismissal of the Indictment. In support of his argument, Summers cites *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (identifying four factors to consider in determining whether speedy trial violation exists); *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (elaborating upon *Barker* factors); and *United States v. Brown*, 169 F.3d 344 (6th Cir. 1999) (discussing when a defendant must prove prejudice to prevail on Sixth Amendment argument). (*See* Doc. No. 12-2)

The Government applies *Barker* and *Doggett* differently, arguing that under the Supreme Court's analysis, Summers's motion must fail. The Government argues "law enforcement officers used reasonable efforts in the attempt to locate [Summers] both during the investigation of this case and subsequent to his indictment." (Doc. No. 15, p. 4) Further, the Government claims it was Summers's "own actions, including multiple prior residences, barment/suspension of his driver's license and sporadic previous employment [that] contributed to the government's inability to locate [him,]" resulting in "the relatively limited delay" of eleven and one-half months between Summers's indictment and his arrest. (*Id.*, pp. 4, 5) The Government asserts the delay was neither intentional nor due to the Government's negligence. (*Id.*, p. 5)

In *Barker*, the Supreme Court addressed some of the circumstances that can implicate a defendant's Sixth Amendment right to a speedy trial. The Court advanced a balancing test for courts to use in determining whether a defendant's speedy trial rights have been violated, noting such a test can only be applied to specific cases on an *ad hoc* basis. *Barker*, 407 U.S. at 529-30, 92 S. Ct. at 2191-92. The Court held:

> We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his [speedy trial] right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. [Footnote omitted.]

Id., 407 U.S. at 530, 92 S. Ct. at 2192. The Court noted there is no "talismanic qualit[y]" to these factors, and none of them is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*, 407 U.S. at 533, 92 S. Ct. at 2193. Thus, the Court recognized that "courts must still

engage in a difficult and sensitive balancing process" which, because it deals "with a fundamental right of the accused, . . . must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Id.*

The Court elaborated on the four factors identified above, and the relative weight each of them might bear in the balancing process, as follows:

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. [Footnote omitted.] To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.
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> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or over-crowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.
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> . . . . Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.

> The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.
>
> A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Barker, 407 U.S. at 530-32, 92 S. Ct. at 2192-93.

The first consideration, then, is the "double enquiry" regarding whether the delay between Summers's indictment and arrest was "uncommonly long." *See Doggett v. United States*, 505 U.S. 645, 651, 112 S. Ct. 2686, 2690, 120 L. Ed. 2d 520 (1992). In the first prong of the "double enquiry," the Supreme Court explained that "[s]imply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay[.]" *Id.*, 505 U.S. at 562-52, 112 S. Ct. at 2690. The Court observed that "[d]epending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Id.*, 505 U.S. at 652 n.1, 112 S. Ct. at 2691 n.1. The Court further cautioned that "as the

term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Id.*

In the present case, Summers was indicted on February 26, 2004, and arrested on February 11, 2005, a period of time obviously "approaching one year." The court finds Summers has alleged a sufficient interval between his accusation and his arrest to trigger speedy trial analysis. *See United States v. Cardona*, 302 F.3d 494, 497 (5th Cir. 2002) ("delay reaching "threshold level of one year . . . is 'presumptively prejudicial,' requiring court to engage in speedy trial analysis).

The second prong of the "double enquiry" regarding the length of delay requires the court to "consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." *Doggett*, 505 U.S. at 652, 112 S. Ct. at 2691. In the present case, the length of the delay barely reaches the "bare minimum," and does not stretch beyond it. Nevertheless, considering the nearly one-year delay between Summers's indictment and his arrest, together with the reason for the delay, as discussed in the next section, the court finds the length of the delay is sufficient to trigger judicial examination of Summers's claim.

Turning to the second factor in the *Barker* analysis, the court finds the delay in this case is the result of neither the Government's deliberate attempt to delay the trial nor any attempt by Summers to avoid apprehension. Indeed, the evidence indicates Summers was not even aware he was under investigation or that he had been indicted. Rather, the delay was due to the Government's negligence in failing to take reasonable steps to locate Summers. The Government alleges "law enforcement officers used reasonable efforts in the attempt to locate [Summers]," and it was his own actions that prevented the Government from locating him earlier. These assertions are not supported by the

evidence in the case, a fact the Government's witnesses all but conceded during the hearing. At the time of Summers's indictment, he was gainfully employed, and a search of Iowa employment records – like the one performed by Deputy Marshal Fuller in early 2005 – would have yielded Summers's then-current address in Emmetsburg, Iowa. Similarly, a check of the driver's license records would have revealed the issuance of a new non-driver identification card to Summers in December 2004, showing his Emmetsburg address. Law enforcement officers did not even place a phone call to Summers's father to ask if he knew where Summers was living. The efforts of Lamp, local law enforcement, and the Marshal to locate Summers in the year following his indictment were not reasonable. To paraphrase *Doggett*, had the Government pursued Summers "with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail." *Doggett*, 505 U.S. at 656, 112 S. Ct. at 2693.

The court next must consider what weight to assign to the Government's negligence. The *Doggett* Court held as follows on this issue:

> While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. . . . *Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. [Citation omitted.] Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, *cf. Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281

> (1988), and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

Doggett, 505 U.S. at 656-57, 112 S. Ct. at 2693-94.

Applying this analysis in the present case leads to the conclusion that the Government "assigned a low prosecutorial priority" to Summers. It is clear that had he been indicted for a capital crime, for example, he could have been located within days, if not hours, following his indictment. Again paraphrasing *Doggett*, "While the Government's lethargy may have reflected no more than [Summers's] relative unimportance in the world of drug trafficking, it was still findable negligence[.]" *Id.*, 505 U.S. at 653, 112 S. Ct. at 2691. On the other hand, the length of the delay only barely clears the threshold that gives rise to presumptive prejudice. Prejudice to the defendant is not stunningly obvious as was the case in *Doggett*, where the delay between indictment and arrest was eight and one-half years. Engaging in the "sensitive balancing process" identified by the *Barker* Court, *see* 407 U.S. at 533, 92 S. Ct. at 2193, the court finds that because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant," the Government's negligence weighs in Summers's favor.

The court finds the third factor is weighted easily in Summers's favor. Summers asserted his speedy trial right promptly after his arrest. That fact "is entitled to strong

evidentiary weight in determining whether the defendant is being deprived of [his speedy trial] right," and in considering the degree of "personal prejudice, which is not always readily identifiable, that he experiences." *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. This leads to the fourth factor – consideration of the extent to which Summers has been prejudiced by the delay.

As the Supreme Court explained in *Barker*, prejudice must be assessed in light of three specific interests the speedy trial right was designed to protect: prevention of oppressive pretrial incarceration, minimization of the accused's anxiety and concern, and limitation of the possibility that the defense will be impaired. *Barker*, 507 U.S. at 532, 92 S. Ct. at 2193. "The last factor is afforded substantial weight since the inability of a defendant to adequately prepare his case skews the fairness of the entire system." *United States v. Brown*, 169 F.3d 344, 350 (6th Cir. 1999) (citing *Barker*, 407 U.S. at 532, 92 S. Ct. at 2182). The first of these interests is not at issue here, as this case does not deal with the length of pretrial incarceration.

Few courts have considered the weight to be given the second of these protected interests, perhaps because of amorphous nature of the personal prejudice an accused experiences, as noted by the *Barker* Court. Here, Summers notes he would not have fathered his two children if he had known he might be in prison while they were growing up. However, the older of Summers's children was born, and the younger was already conceived and into the second trimester of gestation, before Summers was indicted. Thus, although regrettable, the fact that Summers's children face the possibility of growing up without their father is not a factor in the prejudice analysis. Summers also argues he has turned his life around in the last two and one-half years, and he has been employed and lived as a law-abiding citizen. The court fails to see how this fact proves Summers has been prejudiced by the delay in his arrest. Further, Summers cannot argue

the delay caused him undue anxiety because he was not aware he was being investigated or that he had been indicted.

With regard to impairment of his defense, the only prejudice Summers specifically alleges is the effect of the lapse of time on Woodle's testimony, including Summers's ability to cross-examine him effectively and to provide any alibi. He alleges Woodle's testimony before the Grand Jury was "based upon 'estimates' and approximations," Doc. No. 12 at 5, impairing his ability to defend against Woodle's accusations. Summers makes no similar argument regarding the other cooperators who, according to Lamp, implicated Summers in debriefings and Grand Jury testimony, but a similar analysis would apply. The events leading to Summers's indictment allegedly took place from September 1998 through May 2002. (*See* Doc. No. 1) Had Summers been arrested shortly after his indictment, he would have been faced with defending charges arising from events that occurred two to four years earlier. The additional year until his arrest merely compounds the potential that both Summers and his witnesses will have forgotten pertinent events. As the *Barker* Court noted, prejudice exists "if defense witnesses are unable to recall accurately events of the distant past," and loss of memory often is not "reflected in the record because what has been forgotten can rarely be shown." *Barker*, 407 U.S. at 530-32, 92 S. Ct. at 2192-93.

Furthermore, "consideration of prejudice is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655, 112 S. Ct. at 2692. The Supreme Court has noted the inherent difficulty in proving speedy trial prejudice based on impairment of one's defense:

> *Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove

> because time's erosion of exculpatory evidence and testimony "can rarely be shown." 407 U.S. at 532, 92 S. Ct. at 2193. And though time can tilt the case against either side, *see id.* at 521, 92 S. Ct. at 2187; *[United States v.] Loud Hawk*, [474 U.S. 302, 315, 106 S. Ct. 648, 656, 88 L. Ed. 2d 640 (1986)], one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, *see Loud Hawk, supra,* at 315, 106 S. Ct. at 656, it is part of the mix of relevant facts, and its importance increases with the length of delay.

Doggett, 505 U.S. 655-56, 112 S. Ct. at 2692-93. The court finds this factor weighs slightly in Summers's favor.

In summary, under the *Barker* analysis, the first factor – length of delay – weighs in Summers's favor. Although just barely, he has met the threshold for a finding of presumptive prejudice, and the Government has failed to offer evidence sufficient to rebut the presumption. The second factor weighs heavily in Summers's favor. The reason for the delay was nothing more than the Government's negligence. The third factor also weighs heavily in Summers's favor. He asserted his speedy trial right immediately following his arrest, lending support to his claim that he has been prejudiced by the delay. The fourth factor weighs slightly in Summers's favor. Though the delay in this case is far shorter than the years-long delays in some other cases, when added to the distance between the alleged events and the time of indictment, the additional year preceding Summers's arrest has prejudiced his ability to defend against the charges.

The analysis leads to the conclusion that the Indictment against Summers should be dismissed. As the Supreme Court noted in *Barker*:

> This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, ***but it is the only possible remedy*.**

Barker, 407 U.S. at 522, 92 S. Ct. at 2188 (emphasis added).

CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections to this Report and Recommendation as specified below, that Summers's motion to dismiss be **granted**.

Any party who objects to this report and recommendation must serve and file specific, written objections **by no later than April 1, 2005**. Any response to the objections must be served and filed **by April 8, 2005**.

To allow sufficient time for the parties to file such objections as they deem advisable, and for the trial court to issue a final ruling on Summers's motion, the trial of this case, currently scheduled for April 4, 2005, is **continued** to **May 2, 2005**. The time from the date of Summers's motion to the date of trial is excluded for purposes of calculations under the Speedy Trial Act. 18 U.S.C. § 3161(h)(1)(F).

IT IS SO ORDERED.

DATED this 18th day of March, 2005.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT